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In The

Supreme Court of the United States

October Term, 1994

ALAN ROBERT SCHANKMAN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are a defendant's constitutional rights to due process and trial by jury violated where (1) the jury reports four times it is hopelessly deadlocked, (2) the trial court orders further deliberations after each reported deadlock, (3) the court's inquiry after the second deadlock report reveals the vote stands at eleven to one, and (4) the majority jurors coerce the last dissenting juror into changing her vote by stating, *inter alia*, she would have to "answer to the judge" and to the public if she did not vote to convict?

2. Is appellate review for this constitutional issue based only on facts known to the trial court at the times it ordered further deliberations or also on undisputed facts, revealed after the verdict, showing the majority jurors used the trial court's repeated orders for further deliberations as a basis for coercing the last dissenting juror into changing her vote?

3. May a physician be prosecuted (here, by the State of California) for theft from Medicare and the United States where the surgical procedure actually performed by the physician was approved for payment by Medicare administrators in some parts of the United States, including Northern California, but not in other parts, including Southern California, where the physician performed the surgeries and sought payment?

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STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI

Alan Robert Schankman respectfully petitions that a writ of certiorari issue to review the unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven, filed April 7, 1994.

OPINIONS BELOW

On April 7, 1994, the Court of Appeal of the State of California, Second Appellate District, Division Seven, issued its opinion affirming the judgment of conviction against petitioner Alan Robert Schankman. The Court of Appeal's opinion, in its case No. B065887, has not been

reported, and is printed in the attached appendix, beginning at App. 1.[1] Petitioner sought a rehearing. The Court of Appeal's order denying rehearing was entered May 5, 1994 and is reprinted at App. 21.

Petitioner sought review in the California Supreme Court on issues including those presented here. The California Supreme Court denied review on July 13, 1994. Its order is reprinted at App. 22.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1257(a).

The California Supreme Court's order denying review was filed on July 13, 1994. This petition is therefore timely filed pursuant to Supreme Court Rules 13.1 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on

[1] "App." refers to the attached Appendix. "RT" refers to the Reporter's Transcript on Appeal in the Court of Appeal's case no. B065887. The latter citations will first refer to the volume number, followed by a colon, followed by the page or pages, and where appropriate, the line or lines, *e.g.*, "RT 8:2124." "CT" refers to the Clerk's Transcript on Appeal.

a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV, section 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. section 1395u(a)(1)(A) provides:

"In order to provide for the administration of the benefits under this part with maximum efficiency and convenience for . . . providers of services . . . and with a view to furthering coordination of the administration of the benefits under part A of this subchapter and under this part, the Secretary is authorized to enter into contracts with carriers . . . which will perform some or all of the following functions . . . and with respect to any of the following functions which involve payments for physicians' services on a reasonable charge basis, the Secretary shall to the extent possible enter into such contracts:

"(1)(A) make determinations of the rates and amounts of payments required pursuant to this part to be made to providers of services and other persons on a reasonable cost or reasonable charge basis (as may be applicable). . . . "

42 U.S.C. section 1395y(a)(1)(A) provides:

"Notwithstanding any other provision of this subchapter, no payment may be made under part A or B of this subchapter for any expenses incurred for items or services –

"(1)(A) which, except for items and services described in a succeeding paragraph, are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."

STATEMENT OF THE CASE

This action involves (1) constitutional issues that arise in criminal cases where a jury repeatedly reports it is hopelessly deadlocked in its deliberations and (2) the equal protection issue whether a physician may be prosecuted criminally for falsely obtaining payment from Medicare for a surgical procedure that is not paid for by the Medicare administrator in the district where the physician practices, but is paid for in another part of the same state and in other parts of the United States.

A. How The Federal Questions Were Raised.

Petitioner's counsel sought a mistrial and objected to the trial court's orders that the jury continue its deliberations beginning after the jury reported it was deadlocked for the third time. (RT 8:2125.) Petitioner's counsel also raised the coercive effect of the trial court's orders for further deliberations in the mistrial motions and in a motion for a new trial presented after the verdicts. The latter motion was supported by the undisputed declaration of the coerced juror. (RT 8:2132-2133; CT 513-514.)

Petitioner's counsel presented the equal protection issue concerning inconsistent application of Medicare statutes and rules by offering to present evidence to that effect during trial. (RT 2:502-504, 2:519, 3:617-619, 5:1067, 5:1081, 5:1084, 5:1094-1095, 6:1324, 7:1669-1670.)

B. The Medicare Claims Presented By Petitioner.

The facts favorable to the prosecution are summarized at length in the Court of Appeal's opinion. (App. 2-8.) In addition to obvious typographical errors, there is one significant substantive error in that summary, which was brought to the Court's attention in the Petition for Rehearing. The opinion states that petitioner "did not submitoperative [sic] reports" with his claims for payment. (App. 3.) In fact, petitioner did attach descriptive operative reports to each claim for payment. (RT 6:1436-1437; Rehrg. Petn. 4.)

The Court's opinion makes only a brief reference to the evidence presented by the defense, noting that petitioner denied intending to deceive Medicare, but admitted billing under a code number that did not actually describe the surgical procedures he performed. (App. 8.) The opinion omits any reference to the substantial additional evidence that was favorable to petitioner. This evidence, which was brought to the Court of Appeal's attention in the Petition for Rehearing (Rehrg. Petn. 3-10), includes the following:

1. Dr. Bores (RT 5:1148) and Dr. Jensen (RT 4:887) each testified that petitioner was a capable eye surgeon. So did prosecution expert Dr. Latto. (RT 1:269.)

2. Neither of the prosecution experts, Drs. Latto and Salz, perform the surgical procedure at issue here, even though many well-regarded eye surgeons do. (RT 1:274, 3:644.)

3. Dr. Bores and Dr. Jensen each gave opinions that petitioner had performed the surgeries for which he submitted the claims at issue and had not submitted claims for surgeries he never performed. (RT 4:885-886, 5:1140-1141, 5:1148, 5:1258.)

4. Dr. Bores, who is the preeminent refractive eye surgeon in the United States, Dr. Jensen, and petitioner each testified that petitioner had been advised by responsible fellow eye surgeons to submit claims for the surgeries under procedure code 65770, which the prosecution later claimed was an improper code number. (RT 4:898-899, 4:907; 5:1164-1165, 5:1173-1174, 5:1178, 5:1222, 6:1435.)

5. As noted above, petitioner attached descriptive operative reports to his claims under procedure code section 65770. (RT 6:1436-1437.) Anyone reading the operative reports would understand the type of procedure actually performed. (RT 1:270-271; 6:1437.) There was no evidence petitioner knew that Transamerica's claim reviewers would ignore or even discard the operative reports.

6. Dr. Latto acknowledged that the mere cutting of stitches, which the prosecution alleged is all petitioner may have done, is far less complicated than the procedure that witnesses testified petitioner performed. (RT 1:222.)

7. All expert witnesses, prosecution and defense, acknowledged that the field of eye surgery has changed and advanced very rapidly in the last 10 to 15 years. (See, e.g., RT 2:335, 3:681.) Prosecution experts Dr. Salz and Dr. Hoffer acknowledged that many of the advances have

been made by practicing surgeons, such as petitioner, who engage in community practice rather than working at a university. (RT 3:681-682, 4:830.) Any controversy over the benefits of the subject surgeries here was basically resolved by the time of trial.[2]

C. The Jury's Deliberations.

The jury began deliberating on Thursday, December 12, 1991, at 10:23 a.m. (RT 8:1930.) The jury deliberated all day. (RT 8:1937.)

On the second day of its deliberations, the jury asked that prosecution witness Maria Hernandez's testimony be read back. The jury's note also stated, "We need help. We need clarification of jury instructions." (RT 8:1938, quotation at lines 21-22.) The court responded to the latter question by asking the jury, "Please give me a specific question in writing." (RT 8:1939, lines 25-26.) At some point during the day, the reporter began reading back Hernandez's testimony to the jury. (See RT 8:1945.) The jury deliberated for the rest of the day. (RT 8:1947.)

The jury resumed deliberations for the third day on Monday, December 16, 1991. (RT 8:2100.) The reading of Hernandez's testimony concluded at 9:45 a.m. (RT 8:2117.) Later that day, the jury sent its *first note* to the court indicating it was deadlocked: "We can't reach a

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[2] Pursuant to the Federal Register, vol. 56, no. 227, pp. 59502-59503, 59513, and Addendum B, dated November 25, 1991, pertaining to 42 C.F.R. secs. 405, 413 and 415, Medicare now formally authorizes payment for the surgery under procedure codes 65772 and 65775.

conclusive verdict." (RT 8:2118.) With counsel's consent, the court asked the jury, "Do you mean as to some counts or all counts?" (RT 8:2118.) The jury responded, "All." (RT 8:2119.)

The court brought the jury into the courtroom and asked the foreperson, "Is there any reasonable probability that the jury could reach a verdict in this case?" The foreperson replied, "No." (RT 8:2121, lines 1-3, 9.) The court then asked if there was anything it could do to help the jury, such as rereading certain testimony or giving additional instructions. The foreperson replied, "Yes." The court then asked the jury to return to the jury room and send him one or more questions. (RT 8:2121.)

Next, the jury sent its *second note* that it was deadlocked: "We have no questions. We can just not come to a conclusive decision. I'm sorry." (RT 8:2121-2122, quotation at 2122, lines 1-3.) The court responded by asking the foreperson, "I take it now it is your opinion that there is nothing that I can do to aid the jury to arrive at a verdict." The foreperson replied, "That's correct, Sir." (RT 8:2122, lines 18-20.) In response to *the court's inquiry,* the foreperson also indicated the jury had taken three or four ballots already and that the vote at that time was eleven to one, without stating which way. (RT 8:2122-2123.) The jurors then, *individually and unanimously,* stated that further deliberation would not bring about a verdict and there was nothing the court could do to aid the jury. (RT 8:2123-2124.)

Despite the jury's unanimous indication that it was still deadlocked hopelessly, the court stated that " . . . I'm going to ask that for *one more hour* you continue your

deliberations to see if you can reach a verdict consistent, as they say, with the evidence, the instructions of law and your conscience." (RT 8:2124, lines 10-20; emphasis added.) The jury continued to deliberate and later that day sent out its *third note* indicating a deadlock: "We still can't reach a verdict!" (RT 8:2124-2125, quotation at 2125, line 1; exclamation point in original.)

In the absence of the jury, the court stated to counsel that it intended to ask the jury to go home and to come back at 10:00 a.m. the next morning and to send him a message at 11:00 a.m. (RT 8:2125.) The defense moved for a mistrial, noting that the last note from the jury had an exclamation mark at the end. (RT 8:2125.) After further discussion, the court again stated it might be useful to have the jury reflect on the matter overnight, "and sometimes reflecting on something overnight, I know I find it useful, it may be that the jury might." (RT 8:2127, lines 16-20.) (Interestingly, the court's explanation of why it was going to send the jury home that night without declaring a mistrial was inconsistent with its later instruction to the jury that they not form or express any opinions until they reconvened.) The court then directed the jurors to go home, come back at 10:00 a.m. the next morning and send a message in the late morning. The court advised the jury not to discuss the case until they reconvened, "Don't form or express any opinions. Keep an open mind, and then if *you* could *discuss the case a little more with your fellow jurors at 10:00 tomorrow,* I would be deeply grateful to you." (RT 8:2129, lines 16-20; emphasis added.) An adjournment was then taken at 3:20 p.m.

The fourth day of deliberations began at 10:00 a.m. the next day, Tuesday, December 17, 1991. During the

morning, the jury sent its *fourth note* indicating a deadlock: "There isn't any hope of further deliberation." (RT 8:2132, lines 20-21.) The defense moved a second time for a mistrial, noting there was every indication the jury had been deliberating in good faith and that any further deliberations would be coercive. (RT 8:2132-2133.) The court first replied it would not rule on the mistrial motion until it could question the jury in open court, but then the court denied the motion before questioning the jury. (RT 8:2133, 8:2135.) Next, in the presence of the jury, the court reread CALJIC[3] 17.40 and part of 17.41:

> "The People and the defendant are entitled to the individual opinion of each juror.
>
> "Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> "Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.
>
> "Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination." (RT 8:2135, line 22 - 2136, line 7; CALJIC 17.40.)
>
> ". . . . Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts." (RT 8:2136, lines 8-12; CALJIC 17.41.)

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[3] California Jury Instructions – Criminal (5th ed.)

The court then explained it had a matter to handle in another courtroom and would be back in *45 minutes to an hour,* and instructed the jury to continue its deliberations.

The jury continued to deliberate that morning and until 3:05 p.m. when it finally returned guilty verdicts on all counts. (RT 8:2137.)

Subsequent to the verdict, the last dissenting juror, Veronica Machado, submitted a declaration to the court in support of petitioner's new trial motion in which she stated as follows:

> "4. The jury foreman and most of the jurors said that I had to prove to them that Dr. Schankman wasn't guilty and throughout the deliberations *when I expressed my opinion that Dr. Schankman was innocent, the foreman and jurors for a guilty verdict shouted at me, criticized me* and accused me of being emotional. When I would not change my opinion, *statements were made about me by the other jurors such as that I was breaking the law* and 'I think we need to get the judge in here to read you the law.' At other times, *I was ridiculed and laughed at.*
>
> ". . . .
>
> "9. *On the last day of deliberations, after the judge instructed us, I stated that I believed that there was reasonable doubt of Dr. Schankman's guilt.* The response from the other jurors was that: *'The judge wants a unanimous vote, that's why he sent us back in here.'* They also told me that if I continued to vote not guilty, that *I would have to answer to the judge and tell him the reasons for why I was voting not guilty* and also, that the newspapers and the whole country were watching the trial and *I would have to answer to every one* [sic] *to*

explain my vote because this case was important to teach doctors throughout the country a lesson. They told me that the judge would interview me and would want to know the reasons for voting not guilty, if I did not give in and change my vote to guilty.

"10. Following this pressure by my fellow jurors on the last day of deliberations and the pressure that I had encountered before that, I finally changed my vote to guilty. Up until then, for days and through several votes I had withstood the pressure and continued to vote innocent.

"11. At the time that I came back into the courtroom, I was crying and visibly upset about what had happened. . . . " (Declaration of Victoria Machado; emphasis added.)[4]

Neither the prosecutor nor the trial court questioned the content of Ms. Machado's declaration, although she could have been subpoenaed for examination about it and although the opportunity to question it also arose when another juror was examined on another issue at the hearing on petitioner's motion for new trial.

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[4] Juror Machado's declaration was omitted from the Clerk's Transcript. It is a part of the trial court's file. Petitioner asked the Court of Appeal to take judicial notice of it pursuant to California Evidence Code secs. 452(d) and 453. The Court evidently did, because it discussed and quoted the declaration in its opinion. (App. 16.)

D. The California Court Of Appeal's Analysis Of The Jury Issue And Standard Of Review.

The Court of Appeal found no reversible error, stating:

> ". . . . Thus, given the length and complexity of the trial and the relatively short duration of jury deliberations, the trial court could reasonably conclude that a short extension of deliberations was warranted before finding 'no reasonable probability that the jury can agree.' [Citations.]" (App. 16.)
>
> ". . . . [Juror Machado's] declaration was relevant to a claim of juror misconduct raised at the motion for a new trial. . . . However, it was not relevant, to the court's earlier pre-verdict ruling requiring further jury deliberations. The reason? *This deliberation was not before the court at that time. The correctness of the trial court's ruling on the motion for new trial must be assessed on the basis of the facts known to the court at the time of the motion.* [Citations.]" (App. 16.)[5]

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[5] The Court of Appeal also ruled that petitioner "has not challenged the ruling on of [sic] his motion for new trial where Machado's declaration was proffered." (App.16-17.) As pointed out in the Petition for Rehearing, this observation was incorrect. (Rehrg. Petn. 4-6.)

During the jury's deliberations, defense counsel twice moved for a mistrial, based on the jury's unanimous reports of hopeless deadlock. (RT 8:2125, 8:2132-2133.) After the jury's fourth report of hopeless deadlock, and in support of the

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defense's second motion for mistrial, counsel predicted – correctly – that further deliberations would be coercive, thus plainly warning that a new trial would be necessary. (RT 8:2132-2133.)

In his written motion for new trial, petitioner continued with this argument, stating:

> "Further, undue pressure was placed upon Veronica Machado which amounted to misconduct. Despite her desire to vote not guilty, she was ridiculed, criticized and threatened that she would be reported to the judge. . . . On the final day of deliberations, she was threatened again that the judge would be told that she was uncooperative, *that the court wanted a unanimous verdict* and that she would have to explain to the court the reasons for not voting guilty." (CT 513, line 24 - 514, line 4 (Motion for a New Trial, etc.))

In his Appellant's Opening Brief, petitioner's lead argument stated:

> "I. *A NEW TRIAL IS MANDATED BECAUSE THE TRIAL COURT IMPROPERLY COERCED THE JURY INTO REACHING ITS VERDICT AND BECAUSE OF THE MAJORITY JURORS' INTIMIDATION AND THREATS TO THE LAST DISSENTING JUROR.*" (AOB 22; emphasis added.)
>
> Petitioner also contended:
>
> "The majority jurors used the court's rereading of CALJIC 17.40 and 17.41 to impose their 'preponderance of opinion' on dissenting juror Machado – precisely as predicted by defense counsel and in contravention of the rationale of [*People v. Gainer* (1977) 19 Ca1.3d 835, disapproving the "*Allen* instruction." (*Allen v. United States*, 164 U.S. 492 (1896))]. The resulting verdict was therefore the result of improper coercion and cannot stand." (AOB 33.)

The above facts show petitioner had clearly and repeatedly contended that the trial court erred in denying the *motion for new trial*, based *inter alia* upon juror Machado's unchallenged declaration.

REASONS FOR CERTIORARI

I. THE CALIFORNIA COURT OF APPEAL'S OPINION IS INCONSISTENT WITH DECISIONS OF THE UNITED STATES SUPREME COURT CONCERNING CONSTITUTIONALLY PERMISSIBLE PROCEDURES WHERE A JURY REPORTS IT IS DEADLOCKED IN ITS DELIBERATIONS.

Issuance of a writ of certiorari is appropriate and needed in the present case to explicate the constitutionally permissible procedures and limits on trial courts where juries report deadlocks in their deliberations. The present case exemplifies the need for clearer guidelines for trial courts, especially state courts, because prior decisions of this court rendered as long ago as *Burton v. United States*, 196 U.S. 283 (1905), have not been sufficient to assure uncoerced verdicts from juries after they report they are deadlocked.

As this Court has explained, coercion of a deadlocked jury may take many forms. (See *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988).) For example, coercion may flow from the content of or circumstances surrounding an instruction given to the jury after it reports a deadlock. (See *Jenkins v. United States*, 380 U.S. 445, 446 (1965).) Coercion may also occur where the trial court asks the jury to reveal its numerical division, even without revealing which view the majority holds. (*Lowenfield v. Phelps, supra*, 484 U.S. 231, 239-240; *Brasfield v. United States*, 272 U.S. 448 (1926).) In fact, federal trial courts are flatly precluded from inquiring as to a jury's numerical division, as a prophylactic rule. (*Brasfield v. United States, supra*, 272 U.S. 448, 450; *United States v. Sae-Chua*, 725 F.2d 530, 531 (9th Cir. 1984).) It has also been suggested that coercion occurs as a matter of law where a deadlocked

jury is sent back for further deliberations a single time, where the trial court is aware the numerical division is eleven to one. (See *Romine v. Georgia*, 484 U.S. 1048 (1988), Marshall, dissenting.)

This Court's recent discussion of this issue, in *Lowenfield*, is instructive, and indeed should be deemed controlling on the outcome of the present case. In *Lowenfield*, a jury deliberating the penalty to be imposed upon the defendant in a capital case reported it was deadlocked on the second day of its deliberations. The jury also asked the court for advice as to its responsibilities. The court asked the jurors to report their individual views as to whether further instructions would be helpful in reaching a verdict. Eleven jurors answered in the affirmative and one replied in the negative. (484 U.S. at 234-235.) The court then instructed the jury in a fashion similar to the instruction given by the trial court after the fourth report of deadlock in the present case. (484 U.S. at 235.) The jury resumed its deliberations and in 30 minutes returned with a death verdict. (484 U.S. at 235.)

On certiorari to this Court, four dissenting Justices found the latter circumstances were sufficient to compel reversal of the death judgment. The five majority Justices, however, found the circumstances were insufficient, explaining that the previously stated rules by this Court had not been violated by the state trial court:

> "We hold that on these facts the combination of the polling of the jury and the supplemental instruction was not 'coercive' in such a way as to deny petitioner any constitutional right. *By such holding we do not mean to be understood as saying other combinations of supplemental*

> *charges and polling might not require a different conclusion."* (484 U.S. at 241; emphasis added.)

The circumstances of the present case are significant in two respects. First, these circumstances show that trial and appellate courts, such as the courts here, do not appear to appreciate the concerns evinced by all the Justices in *Lowenfield.* Second, the circumstances of this case include an "other combination" of facts foreseen by the *Lowenfield* majority as requiring a "different conclusion." The following distinctions between the two cases justify the "different conclusion":

1. The jury in the present case reported it was deadlocked on four occasions and on each occasion the trial court ordered the jury to continue its deliberations. In *Lowenfield,* the jury reported a deadlock only once and the trial court ordered further deliberations but once.

2. The jury in the present case did not request any further instructions on the law or on its duties; the *Lowenfield* jury did.

3. In the present case, after its second deadlock report, the jury unanimously responded to the court's question that further deliberations *would not be* helpful in reaching a verdict. The *Lowenfield* jury almost unanimously (eleven to one) stated that further deliberations *would be* helpful.

4. Here, the trial court asked the jury after its second report of a deadlock to state its numerical division on the question of guilt. The *Lowenfield* court made no such request. As stated in Lowenfield:

> ". . . . the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear 'in some degree serious although not measurable, an improper influence upon the jury.' " (484 U.S. at 239, quoting *Brasfield v. United States, supra,* 272 U.S. at 450.)

5. In the present case, the jury's numerical division was eleven to one. No information concerning the numerical division was stated in *Lowenfield.*

6. In *Lowenfield,* this Court could only suspect that the jury was coerced in reaching its verdict. In the present case, however, it is undisputed that the last dissenting juror was compelled to change her vote to guilty following the trial court's fourth order for further deliberations and following statements from the majority jurors, *inter alia,* that the trial judge wanted a unanimous verdict.

In summary, petitioner submits that the California Court of Appeal erred in two respects: first, in concluding that the trial court acted properly in response to each of the jury's four reports that it was deadlocked; second, that the trial court correctly denied defendant's motion for new trial based upon the latter court's knowledge at the time it made its rulings requiring further deliberations.

Recent federal authority specifically holds that appellate review in these circumstances must take into account *all* of the circumstances:

> ". . . . We consider whether the court's actions were coercive under a *totality of the circumstances test.* See *United States v. Seawell,* 550 F.2d 1159, 1163 (9th Cir. 1977) ('the general test

> of whether a supplemental jury instruction is in error is to consider all the circumstances to determine if the instruction was coercive'); *Marsh v. Cupp*, 536 F.2d 1287, 1290 (9th Cir. 1976) (test for jury coercion is ' "whether in its context and *under all the circumstances* of this case the statement was coercive" '). " (*Jiminez v. Myers*, 12 F.3d 1474, 1477 (9th Cir. 1993); emphasis added.)

(See also *Jenkins v. United States, supra*, 380 U.S. 445, 446 ["Upon review of the record, we conclude that in its context *and under all the circumstances* the judge's statement had the coercive effect attributed to it." (emphasis added).])

Thus, it makes more sense to review the impact on dissenting jurors of repeated orders for further deliberations by reference to "all the circumstances," including events that follow the challenged instructions. Otherwise, certainty of knowledge as to prejudice from such orders is ignored in favor of speculation based upon "what might have been" – a choice of rules that would hardly speak well of the law's wisdom.

For all these reasons, this Court should review the question of the appropriate procedures for trial courts to follow, and the appropriate standard of review for appellate courts, where a jury repeatedly reports it is hopelessly deadlocked. This Court should declare that trial courts may not, within the limits permitted by the Constitution, repeatedly order a jury to continue its deliberations, as occurred in the present case. In addition, this Court should declare that the Constitution requires

review of such issues to be based upon "all the circumstances," not merely the circumstances known to the trial court at the time it orders the further deliberations.

II. A DEFENDANT IS DENIED EQUAL PROTECTION WHERE HE IS FOUND GUILTY OF THEFT FROM A GOVERNMENT ENTITY, IF HIS IDENTICAL CONDUCT IN ANOTHER PART OF THE ENTITY'S JURISDICTION WOULD NOT CONSTITUTE A CRIME.

Petitioner was charged with fraudulently obtaining payment from Medicare, through its Southern California intermediary, Transamerica, for an eye surgery procedure known *inter alia* as a "wedge," "kereo" or "keratotomy." Petitioner presented evidence that his payment claims for this procedure were made in good faith under an incorrect Medicare code number.

As a further defense, petitioner sought to present expert and documentary evidence that Medicare allowed payment for the same surgical procedure, during the time at issue in this case (1988 and 1989), in other areas of the country, such as Northern California and Maryland. However, the trial court excluded the latter evidence, stating repeatedly that the issue was whether Medicare's Southern California administrator, Transamerica, would pay for the procedure in Southern California where petitioner practiced, not whether administrators in other areas paid for the same procedure. For example, the court explained as follows:

> "Well, he cannot submit his claims to Maryland because that would violate the site of the

> procedure requirement as to which fiscal intermediary must receive the claim." (RT 6:1324, lines 9-12.)

Petitioner contended in the trial court and on appeal that the exclusion of the above evidence *inter alia* violated petitioner's equal protection rights under the Fourteenth Amendment, in that whether petitioner could be accused of the theft alleged here depended solely upon where in the United States or in California that he practiced. The California Court of Appeal rejected this contention, holding:

> "[Petitioner] finally contends the trial court erred when it excluded evidence proffered by the defense that certain Medicare carriers operating in other parts of the United States did pay for [the procedure]. The trial court ruled that any statements in the vertical hierarchy between the United States government and Transamerica could be introduced on an agency theory, but that evidence of the practice of other geographical medical carriers was irrelevant. . . . We conclude: The court's ruling was correct." (App. 18.)

The role of private administrators in the administration of the Medicare statutes and regulations was explained by this Court in *Schweiker v. McClure*, 456 U.S. 188, 190-191 (1982), as follows:

> "The Secretary pays the participating carriers' costs of claims administration. See 42 U.S.C. sec. 1395u(c). In return, the carriers act as the Secretary's agents. See 42 CFR sec. 421.5(b) (1980). They review and pay Part B claims for the Secretary according to a precisely specified process. See 42 CFR part 405, subpart H (1980).

> Once the carrier has been billed for a particular service, it decides initially whether the services were medically necessary, whether the charges are reasonable, and whether the claim is otherwise covered by Part B. See 42 U.S.C. sec. 1395y(a) (1976 ed. and Supp.IV); 42 CFR sec. 405.803(b) (1980). If it determines that the claim meets all these criteria, the carrier pays the claim out of the Government's Trust Fund – not out of its own pocket. See 42 U.S.C. secs. 1395u(a)(1), 1395u(b)(3), and 1395u(c) (1976 ed. and Supp.IV)."

(See also, *Heckler v. Community Health Services,* 467 U.S. 51, 64 [Medicare administrators are conduits; they do not make policy.])

Nothing in *Schweiker* or *Heckler* suggests that the private administrators or intermediaries may enforce "local rules" such that filing a claim for a particular surgical procedure would be fraudulent in one locale, though proper in another. 42 U.S.C. sections 1395u(a)(1)(A) and 1395y(a)(1)(A) make the Secretary responsible for these determinations.[6] And, even if such an inconsistency were allowed by the statutes or by the Secretary, petitioner submits the inconsistency would violate equal protection.

It does not appear that this Court has addressed the issue presented here. (See Anno., *Criminal Prosecution or Disciplinary Action Against Medical Practitioner for Fraud in Connection with Claims under Medicaid, Medicare, or Similar Welfare Program for Providing Medical Services,* 50 ALR3d 549.) However, in *Bowen v. Georgetown University Hospital,*

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[6] See page 4, *supra,* for the text of sections 1395u(a)(1)(A) and 1395y(a)(1)(A).

488 U.S. 204 (1988), this Court did hold that retroactive cost-limit rule making pertaining to Medicare is improper, suggesting that the result allowed here by the California Court of Appeal does not pass constitutional muster.

Also, in *Diplomat Lakewood, Inc. v. Harris,* 613 F.2d 1009, 1023-1024 (D.C. Cir. 1979), the Court of Appeals held that a distinction in Medicare regulations between large independent nursing homes and large hospitals or hospital nursing home complexes, concerning cost computation methods for reimbursement of certain expenses, was arbitrary, capricious, and unlawful. Petitioner submits that the "distinction" in the payment policies of Medicare intermediaries, concerning surgical procedures that may be billed to Medicare is also arbitrary, capricious and unlawful. Indeed, the need for a declaration that such distinctions are improper and violative of equal protection is far greater where the sanction imposed upon the "offending" physician is not mere denial of his or her claim for payment, but, as here, conviction of a felony and imprisonment.

The California Court of Appeal did not recognize what petitioner believes is obvious: whether a person may be deemed guilty of a criminal offense should not depend upon his or her geographical location within the jurisdiction of the government entity that claims it was defrauded.

Summit, Inc. v. United States, 572 F.2d 737 (Ct.Cl. 1978), is also instructive. There, plaintiff contended that some fiscal intermediaries refused to enforce a particular regulation retroactively against providers who were in

the same position as plaintiff and that this discriminatory action denied plaintiff equal protection. The Court responded:

> ". . . . To the extent that this unequal treatment occurred, the unauthorized acts of the intermediaries were not binding on the Secretary. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917); *Bornstein v. United States*, 170 Ct.Cl. 576, 345 F.2d 558 (1965). Since the statute required the Secretary to make the retroactive corrective adjustments, the fact that some intermediaries may have failed to apply the regulation retroactively to other providers, was not an unlawful discrimination which violated plaintiff's constitutional rights." (572 F.2d at 744.)

Here, it must be presumed the Secretary ultimately approved of payments for the surgical procedure performed by petitioner, since payments were made in other parts of the country. It follows that petitioner could not have been convicted for seeking payment for those surgeries if he practiced in those areas. Accordingly, the only way to avoid an equal protection problem is to preclude criminal prosecutions in areas, such as Southern California, where Medicare intermediaries did not approve such claims.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant this petition.

Respectfully submitted,

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALAN ROBERT SCHANKMAN, Defendant and Appellant.	No. B065887 (Super. Ct. No. LA004778) (Filed Apr. 7, 1994)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen D. Petersen, Judge. Affirmed.

Harland Braun, a Professional Corporation, Henry R. Fenton, Edward J. Horowitz, a Professional Corporation, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, and Paul C. Ament, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Alan Robert Schankman (Schankman) of 36 counts of theft from Medicare and the United States.[1] The court sentenced Schankman to the low term of 16 months on count 36, stayed the Penal Code section 12022.6 enhancement, and imposed concurrent low terms of 8 months or 16 months as to the remaining counts. Schankman appeals the judgment.

He contends the trial court (1) improperly coerced the jury into reaching its verdict; (2) the trial court erred (a) in admitting Exhibit 48 and (b) in excluding evidence that Medicare carriers in other geographical areas paid for wedge resections to correct surgically-induced astigmatism.

FACTS

Schankman was an ophthalmologist practicing in North Hollywood. In 1988 and 1989, he submitted the 35 claims to Medicare which are the subject of counts 1 through 35. In each case the claim was for procedure code 65730 (keratoplasty, corneal transplant, penetrating). Under the heading "unusual services" the words "optical

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[1] Schankman was charged by information with 32 counts of grand theft (Pen. Code, § 487, subd. (1)) and 4 counts of attempted grand theft (Pen. Code, § 664). Counts 1 through 35 each alleged theft or attempted theft of over $400 from Medicare and the United States, and listed the name of a patient to identify the transaction involved. Count 36 alleged theft of over $25,000 from Medicare and the United States (Pen. Code, § 12022.6, subd. (b)). It was an aggregation of the incidents charged in the 32 grand theft counts. The court imposed a $330,000 fine, a penalty assessment of $264,000, and restitution to the United States government in the amount of $56,000.

keratoplasty" were added. Schankman's office did not submitoperative [sic] reports.

Of these 35 claims, 5 were denied. All five denied claims were resubmitted, 1 was paid and 4 denied. Under Medicare's 80 percent formula, Schankman received $1,600 for each approved claim submitted under code # 65730.

To understand the charges and evidence of violations by Schankman the following evidence was placed before the jury from expert witnesses.[2] A "cataract" is a clouding of the lens of the eye, and is usually associated with the process of aging in human beings. "Astigmatism" is blurred vision resulting from a lack of equality in the curvature of the vertical and horizontal meridians of the cornea. Approximately 20 to 25 percent of cataract removal operations are followed by some degree of astigmatism. Generally, such surgically-induced astigmatism results from suturing the surgical wound too tightly.

If a significant amount of astigmatism is still present four weeks to two months after cataract surgery, ophthalmologists typically cut the sutures still in place from the cataract operation. The suture cutting is a simple, rapid procedure. A slit lamp and topical anesthetic are used. Normally, stability occurs within about a week, so there would be no reason to prescribe glasses before that time.

A "relaxing incision" can be made in the cornea to flatten a meridian that is too steep. Local anesthesia is

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[2] We view these facts in the light not [sic] favorable to this judgment.

used. The procedure is performed in "semi sterile" conditions (not the scrub-the-room operating room procedure, where surgeons usually are gowned and use gloves, and instruments autoclaved). Although relaxing incisions could relieve surgically-induced astigmatism, such incisions would never be made unless suture cutting proved ineffective. It would be a very uncommon situation that relaxing incisions would be required because suture cutting failed to relieve surgically-induced astigmatism.

A "wedge resection" (or "wedge Keratectomy") is a procedure in which a wedge-shaped strip of corneal tissue is removed and the wound sewn up in order to change the curvature of the cornea (to steepen it). Typically, wedge resections take place after a corneal transplantation. In such cases, wedge resections are often more effective than relaxing incisions in correcting large amounts of astigmatism. *A wedge resection is a complicated procedure requiring sedation of the patient, and injection behind the eye, and removal of fluid from the eye. A wedge resection, to be done properly, should be done in a hospital setting. A wedge resection is rarely done to correct surgically-induced astigmatism following a cataract removal.* (Emphasis [added].)

"Radial keratotomy" refers to a procedure in which relaxing incisions are made on the cornea in a radial pattern, typically to relieve myopia. The term "keratoplasty" means a cutting or physical manipulation of the cornea. A corneal transplant can be referred to as a "penetrating keratoplasty." The term "optical keratoplasty" does not refer to any particular procedure.

Numerical procedure codes are used to bill Medicare. *Billing code 65730 refers to "keratoplasty, corneal transplant, penetrating."* (Emphasis added.) Billing code 65772 refers to "corneal relaxing incision for correction of surgically induced astigmatism." Code 65775 refers to "corneal wedge resection for correction of surgically induced astigmatism." Code 66999 refers to "unlisted procedures on cornea."

The Transamerica Occidental Life Insurance Company administers Part B of Medicare (physicians' services) for the Health Care Financing Administration in seven southern California counties, including Los Angeles County. *In the time relevant to this case (1938* [sic] *and 1989) Medicare-Transamerica paid claims submitted by Schankman under code 65730 because the procedure was reimbursable, but denied claims for procedures 65772 and 65775 because they were not reimbursable.* (Emphasis added.) With respect to procedure code 65730, no "op [operative] reports" were required.

Expert witnesses were called on behalf of the People, testified to the foregoing technical data. These experts included Ira Latto, M.D., an ophthalmologist and a consultant for Transamerica. He examined nine patients associated with twelve of the counts of the information. He also examined Schankman's medical records concerning these patients. Schankman had performed a cataract extraction on each patient. Schankman's medical records revealed that the procedure for which he was billing Medicare under procedure *code 65780* [sic] *was not a corneal transplant, but rather a wedge resection. After the examining the patients. Dr. Latto was of the opinion that what had been done was not a wedge resection, but simply the cutting*

and removal of stitches following cataract surgery. (Emphasis [added].)

James Salz, M.D., was the President of the International Society of Refractive Keratoplasty and a clinical professor of ophthalmology at the University of Southern California. Dr. Salz examined the records of six additional patients associated with six other counts of the information. Although Schankman's records indicated that wedge resections had been done, Dr. Salz, opinion was that Schankman had not done wedge resections. *In fact, in none of the cases would relaxing incisions or wedge resections have been appropriate at the time allegedly performed, because it was too soon after cataract surgery.* (Emphasis [added].)

Kenneth Hoffer, M.D., was a clinical professor of ophthalmology at UCLA's Jules Stein Eye Institute. Dr. Hoffer evaluated the records of several patients whom Dr. Latto had examined, and on whom Schankman had allegedly performed a wedge resection. It was Dr. Hoffer's opinion that what was done in these cases was that sutures had been adjusted or cut or cut and removed to alleviate the astigmatism the patient experienced following cataract surgery, and that a wedge resection was not done.

Schankman performed cataract surgery on Anthony Robertelli (Count 28) in September of 1987. A few months later, Robertelli was having difficulty seeing with the eye. After putting drops in Robertelli's eye, Schankman performed a procedure lasting 15 to 20 seconds, patched the eye, and sent Robertelli home. A month thereafter, appellant removed a loose stitch which was bothering Robertelli.

Maria Hernandez worked for Schankman as a billing clerk from 1985 till January 1990. She testified there was a surgical procedure which was performed in his office which was termed a "kerio" or a "wedge." Schankman performed a "kerio" on almost every patient of his who had undergone cataract surgery. The procedure required a scalpel, tweezers, and scissors. Less care was taken in sterilizing the room than for radial keratotomies. *After these "kerios" were done, Ms. Hernandez received from Schankman a "super bill" in which the procedure code 65730 was circled.* Ms. Hernandez would fill out the Medicare claim form accordingly and send it off to Transamerica.

In May 1989, Ms. Hernandez received a telephone call from a woman from "Medicare." The woman asked what procedure Schankman was performing for which he was billing code 65730. After Ms. Hernandez explained the situation the woman from Medicare then said that the proper code to use was 65772. When Ms. Hernandez reported this conversation to Schankman, he told her not to discuss the matter with anyone because she did not know anything about medicine. *Schankman told Ms. Hernandez to say, if asked, that a Medicare examiner had instructed her to useprocedure code 65730. In fact no Medicare examiner had ever given Ms. Hernandez such instructions.*

Schankman repeated his request to Ms. Hernandez to falsely state that a Medicare examiner had given her procedure code 65730. Ms. Hernandez protested it was a lie. Schankman told her not to worry, that nothing was going to happen. In fear of losing her job, Ms. Hernandez complied. She signed an affidavit for Schankman that she had received the code for the wedge procedure from the insurance company. Other witnesses substantiated the

evidence of Schankman's claim of doing "wedges" on almost all post cataract surgery. Between July 18 and March 31, 1981, Schankman billed and was paid for (by Medicare) 109 times for Code 65730.

Schankman testified in his own defense that he did not intend to deceive Medicare. He admitted he was billing for Keratoplasty Corneal Transplant prevention and was not performing the procedure. The People's evidence substantially supports the theft charges.

DISCUSSION

Schankman asserts the trial court improperly coerced the jury into reaching a verdict. He argues "there simply would not have been any guilty verdicts in the absence of coercion by the court," after the jury had repeatedly – and unanimously – reported it was hopelessly deadlocked, or in the absence of intimidation and threats to the last dissenting juror by majority jurors.

These are the facts before the trial court when it refused to grant a mistrial. Evidence was received in the case from November 7 to December 10, 1991. Counsel argued to the jury on December 11 and 12, and the jury began its deliberations at 10:26 a.m. on Thursday, December 12. The jury was excused at 3:55 p.m.

On the morning of Friday, December 13, the jury requested a reading of the testimony of Maria Hernandez, and also requested "clarification of Jury instructions." The court asked the jury to be more specific with respect

to its instructional request. The read-back of Ms. Hernandez' testimony began at 11:45 a.m. and continued until 3:55 p.m. that day, when the jury was excused.

On Monday, December 16, the read-back of Ms. Hernandez' testimony concluded at 10:45 a.m. Some time before noon, the jury sent the court a note stating: "We can't reach a conclusive verdict." The court responded in writing: "Do you mean as to some counts or all counts? Please answer only 'some' or 'all.' " At 1:30 p.m., after the noon recess, the court indicated that the jury's response to its inquiry was "all."

The court noted (out of the jury's presence) that given the length of the case and the read-back of testimony, the jury had not been deliberating very long. The court then asked the jury's foreperson (juror Hinton): "In your opinion, is there anything that I could do to help the jury arrive at a verdict such as by requesting the rereading of certain testimony or by the giving of additional instructions or by attempting to explain legal instructions that have already been given?" When the foreperson answered: "Yes," the court asked the jury to retire and formulate its questions in writing. The jury's foreperson then wrote the following note to the court: "We have no questions. . . . We can just not come to a conclusive decision. I'm sorry." The court told the jury, in response to the note:

> "First, let me remark that you do not owe me any apology. If the jury cannot reach a verdict, the jury does not owe me a duty to reach a verdict, but what the jury owes me is to conscientiously weigh the evidence in light of the instructions of law and to discuss the case with

> your fellow jurors in an effort to reach a verdict, if you can, consistent with the evidence, the instructions and your conscience."

In response to the court's question, the foreperson revealed that the jury had taken three or four ballots and that the numerical division was eleven to one on the last ballot. The court then asked individual jurors if they believed the jury to be hopelessly deadlocked. Eleven jurors replied in the affirmative, and one replied: "I believe so." The following colloquy then occurred:

> "THE COURT: Now, I think a lot of you, ladies and gentlemen – and I don't wish to seem overbearing, but let me say that this has been a lengthy trial, and I'm going to ask that for one more hour you continue your deliberations to see if you can reach a verdict consistent, as I say, with the evidence, the instructions of law and your conscience.
>
> "May I ask you to do that for me, one more hour until three o'clock. And then if you are of the same mind, as you have just informed me now, that the jury is hopelessly deadlocked and there is nothing that I can do to aid the jury to come to a verdict, if you would communicate that to me in writing as you have done before, Ms. Hinton.
>
> "THE FOREPERSON: Yes, sir.
>
> "THE COURT: Thank you, ladies and gentlemen."

Thereafter, the jury sent the court a message which stated: '"We still can't reach a verdict." In a chambers conference the defense requested a mistrial declaration. The court denied the request, stating:

"No. I have in mind that the jury has not slept for one night after finishing the hearing of the testimony that they requested to have reread. And sometimes reflecting on something overnight, I know I find it useful. It may be that the jury might.

"So I think I'll ask them to come back at 10:00 tomorrow morning and then to send me a message in the late morning as to whether they're actively deliberating or unable to reach a verdict.

"I amy [sic] note that there is a large amount of evidence, documentary evidence in the case. There's a large amount of evidence in the case – let me put it that way. And they've spent a lot of time in the courtroom listening to read back of testimony. They can't have discussed all of the evidence in this case considering the breadth of the evidence and the time that they've deliberated."

The court then made the following statement to the jury (at around 3:18 p.m.):

"Okay. I know that . . . it's not the easiest thing to review the evidence in the case, deliberate and search your conscience. In light of the situation, I think you all ought to go home and come back at 10:00 tomorrow morning and send me a message in late morning. And I would appreciate that.

"So don't discuss the case until you reconvene tomorrow at 10:00. Don't form or express any opinions. Keep an open mind, and then if you could discuss the case a little more with your fellow jurors at 10:00 tomorrow, I would be deeply grateful to you.

"See you tomorrow. Thank you."

The following morning, Tuesday, December 17, the jury resumed deliberations at 10:00. In a chambers conference beginning at 10:10 a.m., the court proposed to reread portions of CALJIC Nos. 17.40 and 17.41 (concerning deliberations) to the jury. Schankman's objection was overruled. However, at around 10:13 a.m., before the court could proceed with the instruction, the jury foreperson sent a note which stated: "There isn't any hope of further deliberation." Schankman's motion for a mistrial was denied. The trial judge indicated he would give the instruction, and informed the jury of the fact that he was handling another case in another department for the next hour. Accordingly, the jury was summoned to the courtroom, and the following transpired:

"THE COURT: Good morning, everyone.
"THE JURY: Good morning.

"THE COURT: Everyone is present. [¶] I want to reread an instruction or two to you. [¶] [Reading.]

"The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so.

"Each of you must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors.

"Do not hesitate to change an opinion if you are convinced that it is wrong. However, do not decide any question in a particular way because the majority of the jurors or any of them favor such a decision.

> "Do not decide any issue in this case by chance such as by the drawing of lots or any other chance determination. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts."

Deliberations resumed at 10:27 a.m., and at a little after 3:00 o'clock in the afternoon, the jury returned its verdicts.

I

Penal Code section 1140 provides:

> "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties . . . or unless, *at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.*"

In *People v. Rodriquez*, 42 Cal.3d 730, 774-776, it [is] stated:

> "Rodriguez contends it was error to deny the defense motion for mistrial after the jury's note of February 18 that it was 'hopelessly deadlocked.' That was the 18th court day after commencement of deliberations and the 11th day after substitution of an alternate juror. The jury had already sent the court four other expressions of impasse, and had received three supplemental charges." "The court's response to the note of February 18 was to ascertain the ballots taken and the numerical division (without indication of direction) and to instruct the jury to continue deliberation. During the next three court days, the jury requested the reading of

testimony of five witnesses. The day after that, it returned its verdict."

The Supreme Court held:

"The determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. (*People v. Rojas* (1975) 15 Cal.3d 540, 546.) The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (*People v. Carter* (1968) 68 Cal.2d 810, 817.)" (See also *People v. Sandoval*, 4 Cal.4th 155, 195-196.)

Schankman relies upon cases not factually akin to the case at bench where for example coercion has been found where the trial court, by insisting on further deliberations, expressed an opinion that a verdict should be reached. (*People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) In both *Crossland* and *Crowley*, the trials had been relatively short and the issues relatively simple, so that further deliberations seemed unnecessary for purposes of enabling the jury to understand the evidence and could only be deemed intended to coerce the minority into joining the majority jurors' views of the case.

Coercion also has been found where there were threats to lock up the jury, or to prolong its deliberations indefinitely. (See *People v. Carter*, 68 Cal.2d 810 at pp. 817-819; *People v. Talkington* (1935) 8 Cal.App.2d 75, 85.) No such coercion occurred here.

In *People v. Rodriguez, supra*, at page 775, the Supreme Court reasoned:

> "Here the trial had been long, the evidence voluminous, and the issues complex. Deliberations had been punctuated by the reading of testimony and three supplemental charges to aid the jury in its task. Under the circumstances, the trial judge could reasonably conclude that his direction of further deliberations would be perceived as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered."

Nothing in the record here suggests the trial court coerced the jury in any way by the language used. In fact Schankman concedes the language was not "per se" coercive. Moreover the length of jury deliberations here does not appear to be unreasonable in light of the complex nature of the evidence and number of issues submitted to the jury – 32 counts. The instructions given here bear no relation to the "Dynamite" instruction disapproved in *People v. Gaines*, 9 Cal.3d 835.

The trial jury was impaneled on November 7, 1991, and the case was submitted to the jurors on December 12, 1991. Evidence had been received on 11 court days. A very large number of documentary exhibits were received in evidence. The evidence was detailed and complex in nature. Before return of its verdicts on Tuesday, December 17, the jury had deliberated only since the previous Thursday. Close to one day of that time was taken up with the read-back of the testimony of Maria Hernandez. Moreover, the court's requests that the jury continue deliberations resulted in the extension of the jury's deliberations before verdict *by only about one day* after the jury

had initially declared itself deadlocked. Thus, given the length and complexity of the trial and the relatively short duration of jury deliberations, the trial court could reasonably conclude that a short extension of deliberations was warranted before finding "no reasonable probability that the jury can agree." (Pen. Code, § 1140; cf. *People v. Breaux, supra,* 1 Cal.4th 281, 317-320; *People v. Rodriguez, supra.*)

II

Schankman argued that juror Machado's declaration required the granting of the motion for mistrial. Machado claimed "pressure and intimidation" by fellow jurors caused him to change his vote to "guilty".

The Machado declaration was submitted in support of Schankman's *motion for new trial.* Such declaration was relevant to a claim of juror misconduct raised at the motion for a new trial. (Pen. Code, § 1181, subd. 3.) However, it was not relevant, to the court's earlier preverdict ruling requiring further jury deliberations. The reason? This deliberation was not before the court at that time. The correctness of the trial court's ruling on the motion for new trial must be assessed on the basis of the facts known to the court at the time of the motion. (Cf. *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048; *People v. Miranda* (1987-88) 44 Cal.3d 57, 70; *People v. Fuller* (1982) 136 Cal.App. 3d 403, 420, fn. 16; *People v. Worthy* (1980) 109 Cal.App.3d 514, 523.)

Schankman has not challenged the ruling on of his motion for new trial where Machado's declaration was proffered. We find no abuse of discretion by the trial

court in the nonchallenged denial of [the] motion for new trial.

III

Schankman next argues the trial court erred in admitting Exhibit 48, a copy of a letter dated June 21, 1998, from Wayne Moon, Chief, Medicare Operations Branch, Division of Program Operations of HCFA in San Francisco to Neil Bass of Transamerica. The letter stated in part that Transamerica *"may add as auto denials procedure codes 65772 and 65775 since they are considered refractive services."*

Schankman contends the exhibit was inadmissible hearsay. The court, however, did not admit Exhibit 48 "for the truth" but merely as a directive of a principal to an agent. The court gave the appropriate limiting instruction.

> "With respect to Exhibits 47, 48 and 49, you may not consider any assertions or statements of fact made in those documents as evidence of the truth of the facts so asserted or stated. *You may consider content of those documents only for the purpose of showing the state of mind and to explain the subsequent course of conduct . . . of the persons who you find from the evidence to have become aware of the contents of those documents, to help explain the testimony of Mr. Kirk and, additionally, to show what instructions were given to Transamerica regarding payment of Medicare claims and to show the interpretation given to the controlling Medicare statutes and regulations by the Health Care Financing Administration, if you find that the respective*

document was issued by that administration and communicated to Transamerica." (Emphasis mine.)

Exhibit 48 was properly authenticated. A competent witness identified the signature on the document and the author's position as Regional Administrator. The document was written on the letterhead of the Department of Health and Human Services. The signature is presumed genuine. Evidence Code section 1400 was satisfied. The trial court did not err in admitting Exhibit 48.

IV

Schankman finally contends the trial court erred when it excluded evidence proffered by the defense that certain Medicare carriers operating in other parts of the United States did pay for procedure codes 65772 and 65775. The trial court ruled that any statements in the vertical hierarchy between the United States government and Transamerica could be introduced on an agency theory, but that evidence of the practice of other geographical Medicare carriers was irrelevant and was also excludable under Evidence Code section 352. We conclude: The court's ruling was correct.

Schankman's theory of relevancy was this: although he made a false representation by using billing code 65730 (penetrating keratoplasty), the victim (the United States government or Medicare) did not "rely" on the false representation since, had the victim known the truth – that Schankman was in fact performing relaxing incisions or wedge resections billable under 65772 or 65775 – the victim would have paid anyway. Central to this argument is Schankman's thesis that it was not Transamerica's

prerogative to decide what procedure is covered and what is not, since that decision was "reserved" to the United States government. Schankman contends Transamerica duty is to "process paperwork."

Schankman's legal theory is incorrect because it rests on a mistaken premise as to how the Medicare system works. Schankman viewed the fact that Transamerica was allegedly among a minority of carriers not paying for procedure codes 65772 and 65775 as indicating that Transamerica was mistaken in not paying for these procedures.

This is a classic case for application of Evidence Code section 352. Evidence of other carriers, coverage policies would have involved complex factual questions. It had a potential to consume an undue amount of time and confuse the issues in the case. (Evid. Code, § 352; see e.g. R.T. 619.) Matched against this, the probative value of the evidence (even assuming Schankman's view of Medicare decision-making procedures was correct) was slight because it was undisputed that Transamerica relied at least in part on Schankman's false representation (the use of procedure code 65730) *when it made the payments to Schankman as to the grand theft counts.* The possibility that Medicare might *eventually* have paid the claims under codes 65772 and 65775 does not negate the fact that the payments, when made, were made in reliance on false pretenses. At the time the payments were made, the crime of theft by false pretenses had occurred, regardless of any future hypothetical events. (See *People v. Andrews* (1958) 165 Cal.App.2d 626, 639 [the crime of false pretenses is completed when property is obtained].)

We find no abuse of discretion in denying admission of the proffered evidence. (*People v. Mincey*, 2 Cal.4th 408, 440.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

STANIFORTH, J.*

We concur:

LILLIE, P.J.

JOHNSON, J.

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* Assigned by the Chairperson of the Judicial Council.

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DIVISION: 7 DATE: 05/05/94

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RE: People of the State of California
vs.
Schankman, Alan R.
2 Criminal B065887
Los Angeles NO. LA004778

THE COURT:

Petition for rehearing denied.

Second Appellate District, Division Seven, No. B065887
S039901

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed July 13, 1994)

THE PEOPLE, Respondent

v.

ALAN ROBERT SCHANKMAN, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice